CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Alliance of Trades and Maintenance; Professional Engineers in California Government; and the Association of California State Attorneys and Administrative Law Judges, concerning the State Personnel Board's December 20, 1989 memorandum on the subject of "Stipulations on Adverse Actions and Rejections of Probation"[1]	1991 OAL Determination No. 1 [Docket No. 90-003] January 9, 1991 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: JOHN D. SMITH, Director

Herbert F. Bolz, Coordinating Attorney
Mathew Chan, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a memorandum issued by the California State Personnel Board concerning stipulated agreements between parties in employee disciplinary actions, contains "regulations," which are without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the portion of the Board's memorandum concerning the contents of stipulated agreements, if an established "rule," is a "regulation." Other portions of the memorandum restate existing law.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not the memorandum issued by the California State Personnel Board ("Board") on December 20, 1989, on the subject of "Stipulations on Adverse Actions and Rejections of Probation," contains "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the Board's rules are generally required to be adopted pursuant to the APA;

(2) portions of the Board's memorandum restate existing law and therefore do not fall within the definition of a "regulation;"

(3) portions of the Board's memorandum indicating approval of certain stipulated agreements prior to January 31, 1990 and concerning the contents of stipulated agreements (assuming the existence of an established rule) constitute "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(4) with respect to those portions of the memorandum that are "regulations," no exceptions to APA requirements apply;

(5) the portions of the memorandum that are "regulations" violate Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

> "The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).
>
> "In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.][10]

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The State Personnel Board is a constitutionally created state agency with adjudicatory power, responsible for the administration of the State civil service system,[11] including the review of adverse action taken against employees.[12]

Authority [13]

The Board has been granted general rulemaking authority by Government Code section 18701. Section 18701 provides in part:

> "The board shall prescribe, amend, and repeal rules in accordance with law for the administration and enforcement of this part and other sections of this code over which the board is specifically assigned jurisdiction."

Background

To facilitate understanding of the present determination, we set forth the pertinent law and facts and circumstances that have given rise to the determination request.

Article 1 of Chapter 8 of the State Civil Service Law[14] relates to disciplinary proceedings. The article outlines a procedure by which the appointing power[15] may take adverse action against an employee for cause.[16] Under the procedure, the employee, following notice of adverse action from the appointing power, is entitled to a hearing or investigation by the Board if the employee requests it.[17] The Board, in rendering its decision, may modify or revoke the adverse action taken by the appointing power.[18] If the employee fails to request an investigation or hearing by the Board within the time specified, the action of the appointing power becomes final.[19]

On January 23, 1990, attorney Lawrence S. Newberry submitted to OAL on behalf of Alliance of Trades and Maintenance ("ATAM") a request for determination pursuant to Government Code section 11347.5, subdivision (b). According to Mr. Newberry, ATAM is the recognized exclusive collective bargaining representative for State Employee Bargaining Unit No. 12; in that capacity, ATAM represents Unit 12 members in adverse action proceedings before the Board. OAL was asked to review an "attached announcement by the

State Personnel Board (SPB) setting forth rules of general application to those submitting stipulations for settlement of adverse actions" to determine if the document contains "regulations" required to be adopted in compliance with the APA. On February 2, 1990, attorney Newberry filed similar requests for determination on behalf of Professional Engineers in California Government and the Association of California State Attorneys and Administrative Law Judges, two other state employee unions.[20]

The document attached to each of the above-mentioned requests for determination is a memorandum dated December 20, 1989 and addressed to "All State Agencies and Employee Organizations." The memorandum concerns "Stipulations on Adverse Actions and Rejections of Probation." Section 19570 of the Government Code defines "adverse action" to mean "dismissal, demotion, suspension, or other disciplinary action." The Board memorandum ("challenged memorandum") states in part:

> "The purpose of this memo is to alert departments and employee organizations of the need to submit proposed Stipulated Agreements to the State Personnel Board on a timely basis and to advise you of certain stipulations which will not be approved.
>
> "A recent review of proposed stipulations submitted by the parties indicate that a number of the agreements are not reaching the Board in a timely fashion. . . . departments and unions should be aware that agreements reached by the parties must be received by the Board prior to the expiration of the applicable appeal period. Government Code Section 19575 provides for adverse actions to become final if no appeal is filed. In those instances where final discussion and documentation of an agreement will not be completed in time for the agreement to be received by the Board prior to the expiration of the appellant's appeal period, the parties should consider the filing of an appeal to preserve the Board's ability to act on any subsequent agreement.
>
> "The Board is aware that a number of proposed stipulations have been executed by the parties which do not comply with the above provisions. On a one-time basis, the Board will consider for approval, until January 31, 1990, those stipulations where no appeal was filed, if the parties clearly indicate in the

proposed stipulation that the agreement was negotiated during either the Skelly Hearing[21] or prior to the expiration of the appellants [sic] appeal period. . . .

"Proposed Stipulated Agreements in which an appeal has not been filed and which were not negotiated during the above period and stipulations which seek to modify final Board decisions on adverse actions, rejections on probation or similar matters will not be considered for approval by the Board. The latter type of stipulations typically seek to modify a decision rendered by the Board following Board action on a proposed decision of an Administrative Law Judge and the lapse of any relevant appeal period.

"Additionally, the Members of the Board recently disapproved a proposed Stipulated Agreement which contained provisions which would have exempted a former employee from indicating on the applications for State employment that their [sic] resignation was under unfavorable circumstances and provided that the department would not communicate to other agencies the circumstances surrounding their [sic] resignation. There are a number of proposed agreements which have not been acted on by the Board which contain similar language. These proposed agreements will be returned shortly to the parties so they may have an opportunity to reconsider the language in these agreements. . . ." [Emphasis added.]

On July 20, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[22] along with a notice inviting public comment.

On August 14, 1990, OAL received the Board's Response to the Request for Determination ("Response"). The Board argues that the challenged memorandum is not a "regulation" as defined in the APA because the memorandum merely provides general information, reiterates the plain meaning of the pertinent statute and states facts.

On August 20, 1990, the California State Employees Association ("CSEA") submitted a comment in support of the Request for Determination, arguing that the Board's memorandum contains interpretations of Government Code section 18681.

On October 29, 1990, the California Correctional Peace Officer's Association ("CCPOA"), another state employee union, submitted a formal request for determination on the same challenged memorandum. CCPOA's request focuses on the discussion relating to the content of stipulated agreements.

II. ISSUES

There are three main issues before us:[23]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER ANY PART OF THE CHALLENGED MEMORANDUM CONSTITUTES A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THOSE PORTIONS OF THE CHALLENGED MEMORANDUM THAT ARE "REGULATIONS" FALL WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The Board is a "state agency" as that term is defined in Government Code section 11000.[24] Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."[25] Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.[26]

In addition, the Board is made subject to the APA by Government Code section 18701:

> "The Board shall prescribe . . . rules in accordance with law . . . ." [Emphasis added.]

We read the word "law" to refer to the statutes pertaining to rulemaking, i.e., the APA. Furthermore, we are aware of no specific[27] statutory exemption which would permit the Board to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER ANY PART OF THE CHALLENGED MEMORANDUM IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,[28] the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined by the key provision in Government Code section 11342, subdivision (b):

> First, is the challenged rule either
>
> - a rule or standard of general application or
> - a modification or supplement to such a rule?
>
> Second, has the challenged rule been adopted by the agency to either
>
> - implement, interpret, or make specific the law enforced or administered by the agency or
> - govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22

Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.][29]

A. Part One - Does the Board's Memorandum Establish Rules or Standards of General Application or Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes." The Board clearly intended its memorandum to have general application -- i.e., that it apply to all state employees. This is evidenced by the memorandum itself, which is addressed to "All State Agencies and Employee Organizations." The Board does not raise the issue of "general applicability" in its Response.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[30]

B. Part Two - Does the Board's Memorandum Establish Rules Which Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Govern the Agency's Procedure?

This portion of our analysis requires that we identify the precise rules at issue. From our review of the Request for Determination, the submitted comment from CSEA, the Board's Response and the challenged memorandum itself, we conclude that the following rules may be gleaned from the language of the memorandum:

1. Proposed stipulated agreements in which an appeal has not been filed and which were not negotiated during either the Skelly Hearing or prior to the expiration of the appellant's appeal period will not be approved by the Board after January 31, 1990.

2. Stipulations which seek to modify final Board decisions on adverse actions, rejections on probation or similar matters will not be considered for approval by the Board.

3. Stipulated agreements, which contain provisions that would exempt a former employee from indicating on applications for State employment that the employee's resignation was under unfavorable

> circumstances and/or preclude the department from communicating to other agencies the circumstances surrounding the employee's resignation, will not be approved by the Board.

With respect to the first rule, the Board argues that the memorandum merely provides advice and reiterates the plain meaning of Government Code section 19575. Section 19575 states:

> "No later than 20 calendar days after service of the notice of adverse action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of adverse action not expressly admitted and a request for hearing or investigation as provided in this article. . . . If the employee fails to answer[31] within the time specified or after answer withdraws his appeal the adverse action taken by the appointing power shall be final. . . ." [Emphasis added.]

The Board argues that under section 19575,

> "[it] has no jurisdiction or authority to accept appeals beyond the expiration of the appeals period . . . or proposed agreements which seek to modify final decisions on appeal."[32] [Emphasis added.]

Our research of the law pertaining to stipulations and jurisdiction discloses support for the Board's position. It is generally understood that "[a] stipulation is an agreement between attorneys for adverse parties, relating to a matter involved in a judicial proceeding, and entered into in the manner prescribed by law."[33] "An authorized stipulation in proper form, unless contrary to law, court rule or policy, is binding upon the court."[34] One instance in which it has been recognized that a stipulation is contrary to law, court rule or policy is when the stipulation attempts to confer jurisdiction of the subject matter on a court which lacks it.[35]

"Jurisdiction of the subject matter" basically means the power to hear or determine the case.[36] "[W]hen, by lapse of time for appeal or other direct attack on the judgement . . . it becomes final, the cause is no longer pending and the court has no further jurisdiction of the subject matter."[37,38] Once lost, jurisdiction cannot be restored by stipulation.[39]

Government Code section 19575 provides that if a party dissatisfied with the adverse action does not file an appeal within a specified time, the adverse action shall become final; no further action is required by the Board.[40],[41] Accordingly, the Board has jurisdiction over the adverse decision only when an appeal has been filed. Under the body of law discussed above, once the action becomes final, the Board loses any opportunity for jurisdiction over the adverse decision and any stipulation entered into thereafter could not grant such jurisdiction.[42] In other words, once the adverse action becomes final, the Board loses its power to affect the outcome of the matter, regardless of the terms or conditions to which the parties are willing to stipulate.

CSEA argues that the Board's rule, pertaining to the filing of stipulated agreements after the adverse action has become final, constitutes an interpretation of Government Code section 18681. We disagree. Section 18681 states:

> "Whenever any matter is pending before the Personnel Board involving a dispute between one or more employees and an appointing power and the parties to such dispute agree upon a settlement or adjustment thereof, the terms of such settlement or adjustment may be submitted to the board, and if approved by the board, the disposition of the matter in accordance with the terms of such adjustment or settlement shall become final and binding upon the parties." [Emphasis added.]

A general rule of statutory construction is that, "[i]f the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words."[43] Section 18681 clearly governs only those matters "pending before the Personnel Board." [Emphasis added.] When no appeal from an adverse action is sought, the action automatically becomes final; there is no involvement by the Board.

Insofar as the Board's first rule provides that stipulated agreements submitted after the expiration of the appeal period shall not be approved, the rule only reflects existing law and does not constitute a "regulation." Unfortunately, the Board's first rule is not stated so simply. By implication, the converse to the first rule is that proposed stipulated agreements which were negotiated during either the Skelley Hearing or prior to the expiration of the appeal period will be approved prior to January 31, 1990. Stated that way, we cannot conclude that the first

rule merely repeats existing law. Rather it undeniably interprets, implements or makes specific the law.

The Board's second rule, which relates to final decisions,[44] is more straightforward. Once the Board loses jurisdiction because of a final decision, no stipulation can revive that jurisdiction. Once the Board decision on a matter has become final, the matter is no longer "pending before the . . . Board" and Government Code section 18681 does not apply. The second rule clearly applies existing law and does not constitute a "regulation."

With respect to the third rule, we note that the Board does not deny that such a rule is a "regulation." Instead, it denies that the memorandum establishes a policy or standard regarding the content of stipulated agreements. According to the Board, the memorandum merely states facts - i.e., that it had

> "recently disapproved a stipulated agreement which contained provisions which would have exempted a former employee from indicating on applications for State employment that their resignation was under unfavorable circumstances and provided that the department would not communicate to other agencies the circumstances surrounding their resignation."

The Board argues that although the memorandum states that the Board was returning proposed agreements which contain similar provisions to the parties "so that they may have an opportunity to reconsider the language," the memorandum does not require the parties to change the language of the proposed agreement. The Board stated that "each [stipulated agreement] will be considered and approved or disapproved as provided by Government Code Section 18682."

In essence, the Board asks that persons reading the December 20th memorandum not read between the lines. While the memorandum does not expressly state that all stipulated agreements containing provisions regarding nondisclosure of circumstances surrounding an employee's resignation will be disapproved, that message is strongly implied. The first sentence of the memorandum states:

> "The purpose of this memo is to . . . advise you of certain stipulations which will not be approved." [Emphasis added.]

Absent additional facts and evidence, we cannot say with absolute certainty that the Board has adopted a rule that restricts the contents of stipulated agreements. However, we can conclude that any such rule would govern agency procedure[45],[46] and constitute a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THAT PORTION OF THE CHALLENGED MEMORANDUM IDENTIFIED AS A "REGULATION" FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTIONS TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.[47] Rules concerning certain activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.[48]

In its Response, the Board did not discuss exceptions to APA requirements. It is uncertain, however, whether this omission expresses the Board's confidence in its position that the challenged memorandum does not contain "regulations" or whether it indicates the Board's view that no exceptions apply. In either case, our independent review discloses no applicable exceptions.[49]

Having found that rules which permit approval of certain stipulated agreements prior to January 31, 1990 and which restrict the contents of a stipulated agreement are "regulations" and not exempt from compliance with the requirements of the APA, we conclude that such rules violate Government Code section 11347.5, subdivision (a).

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Board's rules are generally required to be adopted pursuant to the APA;

(2) portions of the Board's memorandum restate existing law and therefore do not fall within the definition of a "regulation;"

(3) portions of the Board's memorandum indicating approval of certain stipulated agreements prior to January 31, 1990 and concerning the contents of

stipulated agreements (assuming the existence of an established rule) constitute "regulations" as defined in the key provision of Government Code section 11342, subdivision (b);

(4) with respect to those portions of the memorandum that are "regulations," no exceptions to APA requirements apply;

(5) the portions of the memorandum that are "regulations" violate Government Code section 11347.5, subdivision (a).

DATE: January 9, 1991

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1. All Requesters for Determination are represented by attorney Lawrence S. Newberry, 505 North Brand Boulevard, Suite 780, Glendale, California, 91203, (818) 500-8177, 500-9941, and 246-0653. The State Personnel Board was represented by Duane D. Morford, Chief, Policy Division, 801 Capitol Mall, Room 570, Sacramento, California 95814, (916) 445-8241.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,
> >
> > (2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket

No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that

part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

The Board's Response to the Request for Determination was received by OAL on August 20, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00 ($4.65 if mailed).

9. Government Code section 11347.5 provides:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been

adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.

11. 72 Ops.Cal.Atty.Gen. 58 (1989), citing (Cal. Const., art. VII, sec. 18500; Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194, 201, 124 Cal.Rptr. 14, 19; Fair Political Practices Com. v. State Personnel Bd. (1978) 77 Cal.App.3d 52, 55-56, 143 Cal.Rptr. 393, 396; Civil Service Personnel--Jurisdiction of Personnel, 56 Ops.Cal.Atty.Gen. 217, 218-219 (1973).)

12. Skelly v. State Personnel Board, supra, 15 Cal.3d at p. 201, 124 Cal.Rptr. at p. 19.

13. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be

decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

14. Government Code sections 19570 through 19589.

15. Government Code section 18524 defines "appointing power" as "a person or group having authority to make appointments to positions in the State civil service."

16. Government Code section 19574.

17. Government Code section 19575.

18. Government Code section 19583 states in part:

> "The adverse action taken by the appointing power shall stand unless modified or revoked by the board."

19. Government Code section 19575.

20. Professional Engineers in California Government and Association of California State Attorneys and Administrative Law Judges are the exclusive collective bargaining representatives for State Employee Bargaining Units 9 and 2 respectively.

21. The hearing was named after the California Supreme Court case of Skelly v. State Personnel Board (1975) 15 Cal.3d 194, 124 Cal.Rptr. 14, which held that a statute permitting the taking of punitive action against a permanent civil service employee by mere notice violated due process. We presume that the Board's use of the term "Skelly Hearing" was in reference to a pre-termination hearing - i.e., a hearing provided to the employee before a removal decision becomes effective. (See, id., 15 Cal.3d at p. 206, 124 Cal.Rptr. at p. 23; Default Hearings--Licensing--Health, Care Facilities Acts, 59 Ops.Cal.Atty.Gen. 153, 159 (1976).)

22. California Regulatory Notice Register 90, No. 29-Z, July 20, 1990, p. 1090.

23. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

24. Government Code section 11000 states in part:

> "As used in this title [Title 2. Government of the State of California] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.

25. Government Code section 11342, subdivision (a).

26. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

27. By "specific," we mean an exemption which pertains solely to one specific program or to one specific agency, such as the statute stating that the rule setting the California minimum wage is exempt from APA requirements (Labor Code section 1185). A specific exemption contrasts with a "general" exemption or exception, which applies across-the-board to all agency enactments of a certain type, such as the "internal management" exemption.

28. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.

29. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

30. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552; see, Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

31. The written answer constitutes the appeal to the adverse action. (Gov. Code, sec. 19574.)

32. Given that this is the apparent view of the Board, we find it inconsistent that the Board announced it would consider stipulated agreements filed after the end of the appeal period, if those agreements had been negotiated during a Skelly Hearing or before the end of the appeal period, until January 31, 1990.

33. 1 Witkin, Cal. Procedure (3d ed. 1985) Attorneys, section 207, page 238.

34. Id., section 308, page 239.

35. Id., section 205, page 234. "The very nature of subject matter jurisdiction . . . indicates that it cannot be conferred by consent . . .." (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, sec. 10, p. 374.)

36. See, Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288, 109 P.2d 942.

37. 2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, section 261, page 658.

38. There are instances when jurisdiction can be maintained after final judgement. However, those instances are exceptional and limited to special situations such as when the judgment contains a statement reserving power to modify. (2 Witkin, Cal. Procedure (3d ed. 1985) Jurisdiction, secs. 336, 337, 338, pp. 755-756.) We do not have any facts before us concerning the continuation of jurisdiction after final determination. We therefore do not presume that such continued jurisdiction exists.

39. Donner v. Superior Court (1929) 82 Cal.App. 165, 167, citing Sauer v. Superior Court (1925) 74 Cal.App. 580.

40. A brief review of the legislative history behind Government Code section 19575, as set forth in State Civil Service, 21 Ops.Cal.Atty.Gen. 132 (1953), well illustrates this point. The Attorney General Opinion stated:

> "Before the adoption of Chapter 1416, Statutes of 1949, the disciplinary sections of the Civil Service Act (secs. 19570 to 19587) provided for the filing with the State Personnel Board of written charges by the appointing power, or by any other person with the consent of the appointing power, the State Personnel Board or the Attorney General. . . .
>
> ". . . [T]he charges filed initiated the disciplinary procedure which was not final, until a decision was reached by the State Personnel Board (see Wylie v. State Personnel Board, 93 Cal.App.2d 838, 842, 209 Pac. 2d 974[)]. A failure by the employee to answer the charges or to appear at the hearing, admitted the truth of the charges but since the appointing power merely initiated charges, no final disciplinary action had been taken and a decision by the State Personnel Board was required in spite of the failure of the employee to contest the charges. . . .
>
> "Chapter 1416, Statutes 1949, repealed certain of the disciplinary sections (19570 to 19587) of the Government Code, amended

others and added still others so that the procedure was substantially changed . . . .

"As finally adopted, several new grounds for disciplinary action are included in the law; the proceedings are initiated by notice of punitive action instead of by charges. The notice of punitive action is given by the appointing power. . . .

"Within fifteen days after service upon him of the written notice of punitive action 'the employee may file with the board a written answer to the notice, which answer shall be deemed to be a request for hearing or investigation as provided in this article. . . .

". . . [T]he new provision in section 19575 makes the punitive action taken by the appointing power final if the employee fails to answer within fifteen days or if after answer the employee withdraws his appeal." (Id., at pages 133-135, emphasis added.)

41. The Third District Court of Appeal, in the case of Payne v. State Personnel Board (1958) 162 Cal.App.2d 679, 328 P.2d 849, stated:

". . . [S]ections 19574, 19575 and 19579 of the Government Code [do not] conflict with section 2 of article XXIV of the Constitution of the State of California because they permit the appointing power to take punitive action against employees and provide for finality of the action of the appointing power without any action on the part of the Personnel Board. These sections permit punitive action and make the action final unless the employee answers, and, in effect, appeals to the State Personnel Board." (Id., 162 Cal.App.2d at pp. 684-685, emphasis added.)

42. Cf., People v. Rawlings (1974) 42 Cal.App.3d 952, 959, 117 Cal.Rptr. 651, 656 ("The parties may not by agreement or stipulation create an appellate proceeding which is not authorized by statute").

43. Building Industry Assn. v. City of Camarillo (1986) 41 Cal.3d 810, 818, 226 Cal.Rptr. 81, 85.

44. In its Response, the Board cited Title 2, section 70 of the California Code of Regulations (CCR) which states:

> "Unless a proper application for rehearing is made, every decision shall become final 30 days after service by the board of a copy of such decision upon the parties to the proceeding in which the decision is rendered." [Emphasis added.]

We note, however, that section 70 is contained in an article which generally does not apply to adverse action or disciplinary proceeding. (Tit. 2, CCR, sec. 51.)

45. Similarly, the First District Court of Appeal in the case of Ligon v. California State Personnel Bd. (1981) 123 Cal.App.3d 583, 176 Cal.Rptr. 717, held that a policy outlining the procedures and standards for accepting out-of-class experience as qualifying in an examination was a "regulation."

46. "Conformance to the registration and procedural requirements of the [APA] . . . is in the public interest in giving publicity to such administrative interpretations, avoidance of uninformed declarations of administrative policy and the like." (Hutchinson, Rule Making Function of California Administrative Agencies (1964) 15 Hastings L.J. 272, 275, emphasis added.)

47. Government Code section 11346.

48. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition

of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $138.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

49. A brief review of relevant case law demonstrates that the "internal management" exception has been narrowly construed. It applies only if the "regulation" under review (1) affects only the employees of the issuing agency, and (2) does not address a matter of serious consequence involving an important public interest. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; Stoneham v. Rushen

("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1983) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; Grier v. Kizer (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990.) While the rule governing the content of stipulated agreements certainly affects the employees of the Board, its scope is not so limited -- i.e., it affects all employees of the state. Accordingly, it does not fall within the internal management exception.

50. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.